Petition

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81-1981

No. .....

In the Supreme Court of the United States

OCTOBER TERM

ERNEST JOSEPH CASTALDO and COTTON BELT INSURANCE COMPANY, INC., et al.

Petitioners,

vs.

UNITED STATES OF AMERICA

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Dated: April 5, 1982

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QUESTION PRESENTED

1. Whether a bail bond, forfeited pursuant to Rule 46(e)(1) of the Federal Rules of Criminal Procedure for failure to appear, should be remitted, in whole or in part, where the criminal defendant has been reapprehended within a reasonable time and no competent evidence of cost, prejudice or inconvenience to the government was introduced.

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No. .....

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

The petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the proceeding on November 23, 1981.

OPINION BELOW

The opinion of the Court of Appeals, not yet recorded, appears in the Appendix hereto. No opinion was rendered by the District Court for the Central District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 23, 1981. A timely Petition for Rehearing *en banc* was denied on January 18, 1982, and

this Petition For Writ of Certiorari is filed within ninety days of that date. This court's jurisdiction is invoked under 28 USC Section 1254(1).

The petitioners herein are COTTON BELT INSURANCE COMPANY, INC. and INSURANCE COMPANY OF THE WEST. The names of ERNEST JOSEPH CASTALDO and NEIL FREDERICK MILLER appear herein only because they appeared in the original action.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

Federal Rule of Criminal Procedure 46:

> . . . (2) Setting Aside. The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture. (3) Enforcement. When a forefeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon.
>
> . . . (4) Remission. After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subsection.

California Penal Code Section 1305:

> If, without sufficient excuse, the defendant neglects to appear for . . . any occasion when his presence in court is lawfully required . . . the court must direct that fact to be entered upon its minutes and the undertaking of bail . . . must thereupon be declared forfeited . . . and the clerk of the court shall . . . mail notice of the forfeiture to the surety . . . But if at any time . . . within 180 days after mailing of such notice of forfeiture, the defendant and his bail appear, and . . . show to the satisfaction of the court that the absence of the defendant was not within the connivance of the bail, the court shall

direct the forfeiture . . . to be discharged upon such terms as may be just . . .

STATEMENT OF THE CASE

In 1978, Ernest Joseph Castaldo was arrested for unlawful possession with intent to distribute a controlled substance; thus he was charged with violating 21 USC Section 841(a)(1). This charge invoked the original jurisdiction of the United States District Court for the Central District of California, pursuant to 18 USC Section 321, in this matter.

The District Court found Castaldo guilty of violating the above statute. After filing a Notice of Appeal, Castaldo was released by the court on two bail bonds, totalling $250,000.00. The bail was posted by the now deceased bondsman, Neil Frederick Miller, acting as agent for Petitioners, Cotton Belt Insurance Company, Inc. and Insurance Company of the West, Inc., both being sureties for the bail.

A hearing was held on the prosecution's Motion to Reject or Modify the Appeal Bond. Castaldo attended this hearing but did not appear when the hearing reconvened after recess. The court ordered the bail forfeited. Castaldo was returned to custody 170 days after he failed to appear.

Mr. Miller and the sureties moved to have the bail forfeiture remitted pursuant to Federal Rule of Criminal Procedure 46(e). The trial court denied this motion without requiring the petitioners to submit evidence showing why the bail should have been remitted or requiring the government to produce evidence of its cost, prejudice or inconvenience. Petitioners appealed the denial of their motion. The United States Court of Appeals for the Ninth Circuit affirmed the trial court's decision, finding no abuse of discretion.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With Decisions of Federal Appellate Courts in Other Circuits

A. There Is Conflict and Uncertainty Among the Circuits on the Standard of Review to Use in Deciding Bail Remission Cases

B. Even Where Only One Standard of Review Is Used, It Is Unclear When the Forfeiture Will Be Sustained or Set Aside

C. There Is Conflict Among the Circuits as to Whether Forfeitures May Be Sustained Without an Evidentiary Hearing

II. It Is Necessary for This Court to Establish Guidelines to Follow in Bail Remission Cases

III. The Confusion Caused by the Varied Circuit Court Opinions Chills Criminal Defendants' Right to Bail

IV. The Decision Below Conflicts With the Law of California

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With Decisions of Federal Appellate Courts in Other Circuits

A. THERE IS CONFLICT AND UNCERTAINTY AMONG THE CIRCUITS ON THE STANDARD OF REVIEW TO USE IN DECIDING BAIL REMISSION CASES

Rule 46 of the Federal Rules of Criminal Procedure requires forfeiture of a bail bond where the criminal defendant does not appear when his presence is required. Rule 46 also provides that a forfeiture is to be set aside or remitted, in whole or in part, where "it appears that justice does not require the enforcement of the forfeiture." (Federal Rule of Criminal Procedure 46(e)(2) and (4)).

Some circuit courts, unlike the one below, have followed the language of Rule 46 by setting aside or remitting forfeitures where it appeared justice did not require the enforcement. (*Dudley v. U.S.*, 242 F.2d 656 (5th Cir. 1957)) For example, in *U.S. v. Kirkman*, 426 F.2d 747 (4th Cir. 1970), the court remitted a forfeiture as to the sureties because the court concluded "justice does not require the enforcement." (*U.S. v. Kirkman, supra*, 752)

In *U.S. v. Kirkman, supra*, the court noted that "forfeiture and remission are matters within the sound discretion of the district judge." (*U.S. v. Kirkman, supra*, 751) The *Kirkman* court said "the legal standard we must apply to the exercise of discretion by the district court is whether justice requires the enforcement of the forfeiture." (*U.S. v. Kirkman, supra*, 751-752, citing Federal Rule of Criminal Procedure 46 and *U.S. v. D'Argento*, 339 F.2d 925 (7th Cir. 1964))

Other circuit courts, however, have held the applicable standard is not whether justice requires enforcement of the forfeiture, but whether the district court abused its discretion by arbitrarily and capriciously refusing to remit or set aside the forfeiture. (*Stanton v. U.S.*, 226 F.2d 822 (9th Cir. 1955); *U.S. v. Stanley*, 601 F.2d 380 (9th Cir. 1979); and *Sifuentes-Romero v. U.S.*, 374 F.2d 620 (5th Cir. 1967)) Those circuit courts following this standard have uniformly affirmed the forfeitures, yet those following the "justice" standard articulated in *U.S. v. Kirkman* and *Dudley v. U.S., supra*, have not.

Some circuit courts, such as the one below, have thus ignored the "justice" standard as set forth by Congress in Rule 46. One recent Fifth Circuit decision, although first recognizing the "justice" standard, sustained the forfeiture solely because the district court had not abused its discretion. The sureties argued that justice did not require the

forfeiture, but the court said, "We decline to address this question, and consider instead whether the lower court abused its discretion in refusing to set aside the forfeitures." The court concluded, "While reasonable minds could have concluded . . . that justice did not here require a bond forfeiture, we are not persuaded that the lower court abused its discretion . . ." (*U.S. v. Gray*, 568 F.2d 1134 (5th Cir. 1978))

It is therefore unclear whether federal courts are to apply the "justice" standard set forth by Congress in Rule 46, or whether federal courts are free to sustain all forfeitures not made arbitrarily and capriciously.

B. EVEN WHERE ONLY ONE STANDARD OF REVIEW IS USED, IT IS UNCLEAR WHEN THE FORFEITURE WILL BE SUSTAINED OR SET ASIDE

The confusion caused by the circuit courts' use of different standards of review is but one of the conflicts surrounding these bail forfeiture cases; for even where the "abuse of discretion" standard is used, it is unclear what would be a sufficiently arbitrary and capricious decision to constitute a reversible abuse of discretion. What would likely be an abuse of discretion in one circuit, may not be in another.

In, for example, *Smaldone v. U.S.* 211 F.2d 161 (10th Cir. 1954), *Dudley v. U.S.*, 242 F.2d 656 (5th Cir. 1957), *U.S. v. Bass*, 573 F.2d 258 (5th Cir. 1978), and *Appearance Bond Surety v. U.S.*, 622 F.2d 334 (8th Cir. 1980), forfeitures were set aside or remitted under facts nearly indistinguishable from those in *U.S. v. Davis*, 202 F.2d 621 (7th Cir. 1953), *U.S. v. Egan*, 394 F.2d 262 (2nd Cir. 1968) and *U.S. v. Mizani*, 605 F.2d 739 (4th Cir. 1979), where the forfeitures were sustained. This dichotomy of standards demands resolution.

It is likely, though uncertain, that had this case not been decided in the Ninth Circuit, where forfeitures are uni-

formly sustained, the forfeiture would have been overturned and remission ordered.

C. THERE IS CONFLICT AMONG THE CIRCUITS AS TO WHETHER FORFEITURES MAY BE SUSTAINED WITHOUT AN EVIDENTIARY HEARING

The court below summarily held that it is unnecessary to conduct an evidentiary hearing prior to deciding whether a forfeiture should be set aside pursuant to Rule 46. In *U.S. v. Nell,* 515 F.2d 1351 (D.C. Cir. 1975), however, the court held, "When data bearing on relevant factors is [sic] profered, the holding of an evidentiary hearing is essential to an informed exercise of discretion based on 'what is right and equitable under the circumstances and the law.'" (*U.S. v. Nell, supra,* quoting *Langnes v. Green,* 282 U.S. 531, 541, 51 S.Ct. 243, 75 L.Ed. 520 (1931)).

Likewise, in *U.S. v. Bass,* 573 F.2d 258 (5th Cir. 1978), the court, though "reluctant to decide upon the record available," remanded the forfeiture because of the scant record before it. Hence, the court wrote, "A clearer statement of the basis for the forfeiture would assist in determining if justice required an additional remission . . ." (*U.S. v. Bass, supra,* 260)

In *U.S. v. Parr,* 560 F.2d 1221 (5th Cir. 1977), the court remanded because it "seemed desirable that the district court take another look." (*U.S. v. Parr, supra,* 1224)

In *U.S. v. Foster,* 417 F.2d 1254 (7th Cir. 1969), the court remanded the case because "it may well be arbitrary and capricious to enforce the full judgment. We simply don't know because we do not have sufficient facts before us." (*U.S. v. Foster, supra,* 1258)

Some cases sustaining forfeitures have done so only after noting there *was* sufficient evidence in the record supporting the forfeiture. (*U.S. v. Nolan,* 564 F.2d 376 (10th

Cir. 1977); *U.S. v. Hesse*, 576 F.2d 1110 (5th Cir. 1978); and *U.S. v. Stanley*, 601 F.2d 380 (9th Cir. 1979)) These cases are consistent with the notion that "a finding without evidence is arbitrary and baseless." (*Interstate Commerce Commission v. Louis. & Nash. R.R.*, 227 U.S. 88, 91, 33 S.Ct. 185, 57 L.Ed. 431 (1912))

Other cases have, however, impliedly held it is unnecessary to conduct an evidentiary hearing prior to sustaining a forfeiture. (*U.S. v. Davis*, 202 F.2d 621 (7th Cir. 1953); and *Larsen v. U.S.*, 296 F.2d 167 (8th Cir. 1961))

Hence, it is again unclear to what extent an evidentiary hearing in bail forfeiture cases is required.

II. It Is Necessary for This Court to Establish Guidelines to Follow in Deciding Bail Remission Cases

The confusion and uncertainty caused by the varied, inconsistent circuit court opinions create a substantial, reoccurring problem that will continue until this Court establishes guidelines all federal courts can apply.

Federal courts are now uncertain of what standard of review is to be used, what constitutes "arbitrary and capricious" action where the "abuse of discretion" standard is used and whether it is necessary to conduct an evidentiary hearing prior to deciding whether to sustain a forfeiture. Guidance is needed to settle these uncertainties.

III. The Confusion Caused by the Varied Circuit Opinions Chills Criminal Defendants' Right to Bail

The confusion and uncertainty caused by the varied, inconsistent circuit court opinions prevent sureties from ascertaining the risk they encounter in bonding criminal defendants. Hence, they are becoming increasingly reluctant to bond criminal defendants, regardless of the Federal jurisdiction in which the case is tried.

Many criminal defendants are, therefore, unable to secure their constitutionally guaranteed release by bail. The right to bail is being abridged and no longer preserved; and, as this Court has stated, "unless this right to bail before trial is preserved, the presumption of innocence secured only after centuries of struggle, would lose its meaning." (*Stack v. Boyle*, 342 U.S. 1, 4, 72 S.Ct. 1, 96 L.Ed. 3 (1951)

IV. The Decision Below Conflicts With the Law of California

California Penal Code Section 1305 requires that the trial court "shall direct the forfeiture of the undertaking or the deposit to be discharged upon such terms as may be just" where the criminal defendant and his bail appear in court within 180 days after the forfeiture. (California Penal Code Section 1305) The only requirement under this is that there is a showing that there was a justified excuse for the defendant's absence "or . . . that the absence of the defendant was not within the connivance of the bail . . ." (California Penal Code Section 1305)

California law, if controlling below, would have required the District Court to remit or set aside the forfeiture since the criminal defendant appeared in court within 180 days after the forfeiture. This would not have been a matter of the court's discretion, according to the California Supreme Court, which noted the word "may" in Penal Code Section 1305 had been amended to read "'shall' and thereby made mandatory the granting of relief upon such terms as may be just if a timely motion is made and the inability specified by the statute is shown." (*People v. Durbin* (1966) 64 C2d 474, 476, 413 P2d 433; in accord, *People v. United Bonding Insurance Co.* (1971) 5 C3d 898, 489 P2d 1385; and *People v. Pugh* (1970) 9 CA3d 241, 88 CR 110)

The California Supreme Court's treatment of forfeiture cases is thus, although contrary to the District Court below, reflective of the "continuing legislative trend toward broader relief from the forefiture of bail." (*People v. Rolley* (1963) 223 CA2d 639, 35 CR 803)

CONCLUSION

For the above reasons, petitioners respectfully pray this court to issue a Writ of Certiorari to review the judgment and opinion of the court below so that the conflict surrounding these cases may be settled.

Dated: April 5, 1982

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Counsel For Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 14 day of April, 1982, three copies of the Petition For Writ of Certiorari were mailed, postage paid, to Andrea Sheridan Ordin, Robert L. Brosio and Henry H. Rossbacher, of the Office of the United States Attorney. I further certify that all parties required to be served have been served.

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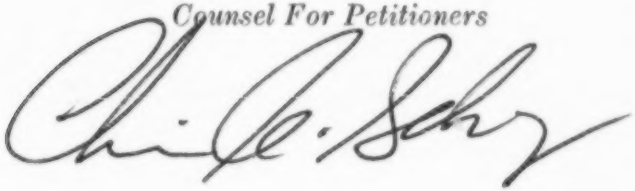
Counsel For Petitioners



Appendix

Appendix

1. Opinion and Judgment of the Court of Appeals;
2. Order Denying Petition For Rehearing;
3. Filing and Spreading Judgment of the Court of Appeals

FILED—Nov 23 1981
Clerk, U.S. Court of Appeals

United States Court of Appeals
For the Ninth Circuit

No. 80-5258

D.C. #CR 78-1042-WJF

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ERNEST JOSEPH CASTALDO,
Defendant,

COTTON BELT INSURANCE COMPANY, INC.,
INSURANCE COMPANY OF THE WEST and
NEIL FREDERICK MILLER,
Sureties, Real Parties in Interest and Appellants.

MEMORANDUM

Appeal from the United States District Court
for the Central District of California
Warren J. Ferguson, District Judge, Presiding
Argued and Submitted October 9, 1981
Decided .....

Before: SKOPIL, FARRIS, and BOOCHEVER, Circuit Judges

At issue in this appeal is whether the trial court abused its discretion in refusing to set aside or remit a bond forfeited pursuant to Fed. R. Crim. P. 46(e)(1) following Castaldo's failure to appear at a scheduled post-conviction hearing.

Rule 46(e)(1) mandates the forfeiture of a bond upon the breach of a bond condition, such as the defendant's non-appearance. The rule, however, confers discretion upon the trial court to set aside or remit all or part of a forfeiture "if it appears that justice does not require the enforcement of the forfeiture." Fed. R. Crim. P. 46(e)(2) and (4). A trial court may consider various factors when deciding whether to remit or set aside a forfeiture, including 1) the willfulness of the defendant's breach of conditions; 2) the participation of the sureties in apprehending the defendant; 3) the cost, inconvenience and prejudice suffered by the government as a result of the defendant's breach; and 4) any explanation or mitigating factors presented by the defendant. *See United States v. Stanley*, 601 F.2d 380, 382 (9th Cir. 1979) (per curiam). We will not overturn a trial court's ruling on a motion to set aside or remit a forfeiture absent an abuse of discretion. *Id.* at 382.

The facts herein do not support a finding of an abuse of discretion. The record contains ample support for upholding the forfeiture. Affidavits submitted by the parties showed that: Castaldo's breach was willful; the bonding companies took no active role in apprehending Castaldo; and the government incurred considerable, although unspecified, expense in its 170 day search for Castaldo. No mitigating factors were offered. Moreover, the appellants were experienced at bonding criminal defendants. They were aware of the risks of executing and filing a bond on Castaldo's behalf. The government had even apprised them that it perceived Castaldo as a likely candidate for "jumping bail."

Nor did the trial court abuse its discretion by failing to conduct a full-scale evidentiary hearing on the bonding companies' motion to set aside or remit. The court based

its decision on adequate evidence contained in the parties' affidavits. Moreover, the sureties never requested an evidentiary rehearing.

Finally, the appellants' policy argument fails. The forfeiture will not have a chilling effect on the willingness of bonding companies to help criminal defendants exercise their constitutional right to bail. Instead, it will encourage bonding companies to ascertain more carefully the value of the security given by defendants, to consider the likelihood of the defendant breaching a bond condition, to take reasonable precautions to assure the defendant's appearance, and to cooperate fully in efforts to reapprehend a defendant who fails to appear.

The district court's order is AFFIRMED.

Filed—Jan 18 1982

Clerk, U.S. Court of Appeals

United States Court of Appeals
for the Ninth Circuit

No. 80-5258

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ERNEST JOSEPH CASTALDO,

Defendant,

COTTON BELT INSURANCE COMPANY, INC.,
INSURANCE COMPANY OF THE WEST and
NEIL FREDERICK MILLER,

Sureties, Real Parties in
Interest and Appellants.

ORDER

Before: SKOPIL, FARRIS, and BOOCHEVER, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion. Fed.R.App.P. 35(b).

The suggestion for rehearing is denied and the suggestion for a rehearing en banc is rejected.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES—GENERAL

Case No. CR78-1042-F Date February 18, 1982

DOCKET ENTRY:

PRESENT: HON. WARREN J. FERGUSON, JUDGE

Joseph M. Levario	Non Appearing	Non Appearing
Deputy Clerk	Court Reporter	Asst. U. S. Attorney

U.S.A. v. (DEFENDANTS LISTED BELOW)	ATTORNEYS FOR DEFENDANTS
(1) Ernest Joseph Castaldo; Cotton Belt Ins., & Neil Frederick Miller	(1) None Appearing
....present ....custody ....bond ....O/R	....present ....appointed ....retained
(2)	(2)
....present ....custody ....bond ....O/R	....present ....appointed ....retained
(3)	(3)
....present ....custody ....bond ....O/R	....present ....appointed ....retained
(4)	(4)
....present ....custody ....bond ....O/R	....present ....appointed ....retained

PROCEEDINGS: Filing and Spreading Judgment of the Court of Appeals

The Judgment of the Court of Appeals affirming the judgment of the District Court is filed and spread upon the records of this Court.
(ent .....)

cc: Henry H. Rossbacher
Asst. U. S. Atty.
Office of the U. S. Atty.

William T. Murphy
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68 Mitchell Blvd., Suite 250
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MINUTES FORM 6 Initials of Deputy Clerk .....
CRIM—GEN

D—M